

After electricity was installed PW 1 came to see me. He told me that the electricity was not enough."

On the evidence it is clear that until November 1980 no electricity supply at all was available at the premises concerned. As stated in the letter to the appellant dated November 27, 1980 (page 118) the respondent notified the appellant that only then "the premises is now ready for occupation, electricity having been installed". Thus as seen from the evidence it is absolutely clear that the sole reason for the delay was the installation of electricity into the premises. The question of inadequacy of electricity came later.

Thus it may be true that the respondent did not know how much electricity was required by the appellant in the premises until November 1980 but there is no evidence to show that even the normal supply of electricity was available before November 27, 1980. What is clear from the evidence is therefore the following:—

(a) the appellant had agreed to extend the time of commencement of the tenancy up to but not later than August 31, 1980;

(b) the respondent admitted in the letter dated November 27, 1980 that the premises was ready for occupation only then.

To summarise, the agreement expressed in the various letters exchanged between the parties after the notice of repudiation (AB 12) by the respondent was that the parties agreed to have a tenancy commencing from April, 1980 and extended finally by mutual consent to August 31, 1980 conditional upon installation of electricity into the premises. It has been established beyond doubt both by letter dated November 27, 1980 and the respondent's own testimony that the respondent was unable to have electricity installed until November 1980. There is therefore no doubt that the appellant was entitled to rescind the agreement on November 18, 1980.

As regard the claim for damages, the claim for damages in respect of the void agreement does not arise. In any case the appellant have themselves to blame to continue to deal with the respondent knowing that he was not the registered owner. The claim for damages in respect of the subsequent agreement has not been supported by satisfactory evidence. PW 1 only said he had "incurred \$2,200/- as expenses". This bare statement cannot be a satisfactory basis for an award of damages in the circumstances of the case. The claim for damages is accordingly dismissed.

A There shall be an order of 8% per annum interest on the sum of \$15,000/- from the date of judgment of the learned President (August 1, 1980).

B Appeal is allowed with costs to the appellant here and the court below.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.; C. Jegathesan & Co.*

GANAM D/O RAJAMANY v. SOMOO S/O SINNAH

D [F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.J.J.) February 8, March 20 & July 14, 1984]

[Kuala Lumpur — Federal Court Civil Appeal No. 151 of 1982]

E *Land Law — Sale of land — Specific Performance — Acknowledgement of receipt of deposit in agreement of sale — Whether open to vendor to prove consideration not paid — Whether time essence of contract — Discretion of court in decreeing specific performance — Contract rescinded — Damages — Specific Relief Act, 1950, ss. 21, 23, 24 & 36 — Contracts Act, 1950, s. 56.*

F *Evidence — Acknowledgement of receipt of deposit in agreement of sale — Whether open to vendor to prove consideration not paid — Evidence Act, 1950, ss. 91 & 92.*

G In this case the appellant had agreed to sell her lands to the respondent. At the time of signing the contracts the appellant orally agreed to allow the respondent to enter into occupation of one of the properties but she alleged that the respondent had wrongfully entered on the other properties also. The respondent had failed to pay the balance of the purchase price and the appellant purported to rescind the contracts. She then brought an action to claim that the contracts had been effectively rescinded, forfeiture of the deposits, damages for trespass, mesne profits and ancillary relief. The learned Judicial Commissioner, who heard the case, found (a) that the actual selling price was \$90,000-00 as claimed by the appellant; (b) that the actual date of completion was 31.3.77 as claimed by the appellant; (c) that the first property was leased to the respondent and the respondent agreed to pay \$1,000-00 at the end of each padi harvest every six months; (d) that the respondent had paid \$36,000-00 to the appellant or her agent; (e) and that time was not made the essence of the contract. Since he found that the respondent was ready and willing to complete the sale, he ordered the contracts to be specifically performed. The claim of the appellant was therefore dismissed. The appellant appealed against the decision of the learned Judicial Commissioner on questions (d) and (e) as well as the order directing specific performance of the contracts.

Held: (1) although the agreement of sale contained an acknowledgment of the receipt of the deposit of \$10,000-00, it was open to the vendor to prove that no consideration had actually been paid. In this case the appellant had proved that the sum of \$10,000-00 was not in fact received by her and therefore the total sum paid by the respondent was \$26,000.00.;

(2) the learned Judicial Commissioner was right in holding that it was not the intention of the parties to make time the essence of the contracts and that the unilateral act of the appellant in purporting to rescind the contracts without giving to the respondent reasonable notice making time to be of essence was wrong in law;

(3) it is not sufficient for a purchaser to prove that he had at all times been ready and willing to complete the sale; he must also prove that he had performed or had been at all times ready and willing to perform his part of the contract or his part of the obligations of the contract as fixed or interpreted by the court. Since the respondent was unable to bring his case under this principle, the learned Judicial Commissioner was wrong to decree an order that the contracts be specifically performed;

(4) in this case the court could exercise its jurisdiction to rescind the contracts as there was no difficulty in restoring the parties to their original position. As the contracts are cancelled by the court under section 36 of the Specific Relief Act, 1950, the respondent is not entitled to damages;

(5) since the contracts have been rescinded by the court, the appellant is not entitled to mesne profits in respect of her properties but only to reasonable compensation as justice may require. The respondent on the other hand is entitled to the return of the sum of \$26,000.00 paid by him to the appellant.

Cases referred to:

- (1) *The Firm of T.A.R. CT. v. The Firm of SV. KR* [1952] M.L.J. 198; [1955] M.L.J. 2.
- (2) *Linck, Moeller & Co v. Jameson & Co* (1885 - 86) 2 T.L.R. 206.
- (3) *Sah Lai Chand v. Indarjit* (1899 - 1900) 27 I.A. 93.
- (4) *Jamshed v. Burjorji* A.I.R. 1915 P.C. 83.
- (5) *Stickney v. Keeble* [1915] A.C. 386.
- (6) *Warren v. Tay Say Geok* [1965] 1 M.L.J. 44.
- (7) *Steedman v. Drinkle* [1916] 1 A.C. 275.
- (8) *Brickles v. Snell* [1916] 2 A.C. 599.
- (9) *Tilley v. Thomas* (1867) 3 Ch App. 61.
- (10) *Haji Hasnan v. Tan Ah Kian* [1963] M.L.J. 175, 176.
- (11) *Yeow Kim Pong Realty Ltd v. Ng Kim Pong* [1962] M.L.J. 118, 120.
- (12) *Lee Yew Hin v. Kow Lup Piow* [1974] 1 M.L.J. 114.
- (13) *Etablissements Chainbaux S.A.R.L. v. Harbor-master Ltd.* [1955] 1 L.L.R. 303.
- (14) *In re Stone & Saville's Contract* [1963] 1 W.L.R. 163.
- (15) *Edridge v. Sathna* (1933) 60 I.A. 363.
- (16) *Oxford v. Provand* (1868) L.R. 2 P.C. 135, 151.
- (17) *Lamare v. Dixom* (1873) L.R. 6 H.L. 414, 423.
- (18) *Mama v. Sassoon* (1927 - 28) 55 I.A. 360, 372 - 373.
- (19) *Karasandas v. Chotalal* 25 I.L.R. Bom 1037, 1050.

A

(20) *Berners v. Fleming* [1925] 1 Ch. 264.

(21) *Babu Bindeshri Prashad v. Mahant Jairam Gir* (1886 - 87) 14 I.A. 173.

(22) *Tan Ah Boon v. State of Johore* A.I.R. 1936 P.C. 236; [1936] M.L.J. 187.

(23) *Erlanger v. New Sombrero Phosphate Co.* (1877 - 78) 3 App. Cas. 1218, 1278.

B

FEDERAL COURT.

P. Vijendran for the appellant.

G. Vadiveloo for the respondent.

C

Cur. Adv. Vult

D

Seah F.J. (delivering the Judgment of the Court): For the purpose of this appeal the appellant will be referred hereinafter as the plaintiff and the respondent as the defendant. The relevant facts may be stated shortly.

E

The plaintiff is at all material times the registered owner of four acres of land in the kampong of Sungei Burong in the Mukim of Tanjong Karang held under EMR 5071 and made up of:—

(i) Lot No. 10671 for 3 acres of padi land (hereinafter referred to as the First Property) and

(ii) Lot 5481 for 1 acre of coconut plantation and the premises thereon (hereinafter referred to as the Second Property).

F

Following the death of her husband the plaintiff became the registered owner by way of transmission of another four acres of land in the same kampong and district held under EMR 5072 and made up of —

G

(a) Lot No. 10665 for 3 acres of padi land (hereinafter referred to as the Third Property) and

H

(b) Lot 5482 for 1 acre of coconut plantation and the premises thereon (hereinafter referred to as the Fourth Property).

I

On September 9, 1974 the plaintiff agreed to sell all the four parcels of lands to the defendant at the price of \$90,000.00. This sale and purchase agreement was reduced into writing by the execution of two contracts and marked as exhibits P1 and P2. Ex. P1 covered the sale of the First and Second Properties and the purchase price was stated to be \$75,000.00. And Ex. P2 was in respect of the sale of the Third and Fourth properties and the

purchase price was \$15,000.00. The combined total price amounted to \$90,000.00. Under the term of the contracts the date for completion was fixed for March 31, 1977. Up-to-date the plaintiff said that the defendant paid only the sum of \$26,000.00 and when the defendant failed to pay the balance of the full purchase price on due date or within a reasonable time thereafter the plaintiff purported to rescind the contracts on November 9, 1977.

At the time of the signing of the contracts the plaintiff alleged that she orally agreed to allow the defendant to enter into occupation and to cultivate the First property from September 10, 1974 onwards and until the actual completion of the contracts the defendant was to pay to the plaintiff a sum of \$1,000.00 at the end of each padi harvest every 6 months. It was further alleged that the defendant wrongfully entered and took possession of the Second, Third and Fourth properties in November 1977 or thereabout after the defendant had been informed by the plaintiff that the said contracts had been repudiated.

Following these events the plaintiff on May 11, 1978 took out a writ in the High Court at Kuala Lumpur against the defendant seeking, *inter alia*, a declaration that the said contracts had been effectively rescinded, forfeiture of the said deposits, damages for trespass, mesne profits and other ancillary relief.

By his defence the defendant raised a number of issues of mixed law and fact and they were conveniently summarised by the learned Judicial Commissioner under five heads, namely:

- (1) The actual selling price. Was it \$90,000.00 as claimed by the plaintiff or \$75,000.00 as alleged by the defendant.
- (2) The actual date for completion of sale. Was it March 31, 1977 as contended by the plaintiff or March 31, 1978 as claimed by the defendant.
- (3) Whether Lot No. 10671 (First Property) was leased to the defendant as alleged by the plaintiff while the defendant contended that he was in lawful occupation by virtue of being a beneficial owner under the contract Ex. P1.
- (4) The amount paid by the plaintiff: Was it

A \$26,000.00 as alleged by the plaintiff or \$59,000.00 as claimed by the defendant.

(5) Whether time was made the essence of the contracts.

B The defendant also counterclaimed for specific performance of the said contracts on payment of the sum of \$11,000.00 (later amended to \$16,000.00) or alternatively, damages for breach of contracts and in the further alternative rescission of the said contracts and repayment to the defendant of the sum of \$64,000.00 (later reduced to \$59,000.00) together with another sum of \$59,000.00 as agreed liquidated damages.

The learned Judicial Commissioner found in favour of the plaintiff in respect of Questions 1, 2 and 3, namely that the agreed purchase price under the two contracts marked as Ex. P1 and P2 was \$90,000.00, that the date for completion of the said contracts was March 31, 1977 and that the First Property was leased to the defendant as from September 10, 1974 onwards and that the defendant agreed to pay to the plaintiff a sum of \$1,000.00 at the end of each padi harvest every six months. As regards Question 4 the learned Judicial Commissioner held that the defendant paid to the plaintiff and/or to her agent the total sum of \$36,000.00 and on the last question, the Court ruled that time was not made the essence of the contracts. Since the learned Judicial Commissioner found that the defendant was ready and willing to complete the sale the Court ordered the contracts to be specifically performed subject to payment by the defendant into Court to the credit of the plaintiff of the sum of \$54,000.00 within six weeks from date of judgment. The Court also awarded to the plaintiff \$3,000.00 representing arrears of rent for the use and occupation of the First property described as Lot No. 10671 for three padi harvests up to the month of November 1977 with interest at 8% per annum. In the result the main claim of the plaintiff was dismissed with costs to the defendant.

I On reading the memorandum of appeal it seems that the plaintiff accepted the findings of the learned Judicial Commissioner with regard to Questions 1, 2 and 3 but was dissatisfied with the conclusions on Questions 4 and 5 as well as the order directing specific performance of the contracts.

As there was no cross-appeal by the defendant on the findings of the Judicial Commissioner relating to Questions 1,2 and 3 we would therefore assume that the defendant too was quite prepared to accept them.

The first question to be considered in this appeal was whether the learned Judicial Commissioner was right in holding that the defendant had paid to the plaintiff and/or to the plaintiff's agent the sum of \$36,000.00. It seems that the learned Judicial Commissioner had accepted the testimony of the plaintiff that in the year 1975 the defendant had paid a total sum of \$26,000.00 made up of (a) \$10,000.00, (b) \$10,000.00 and (c) \$6,000.00 vide receipts marked Exhibits D5A, D5B and D6A respectively. How did the learned Judicial Commissioner arrive at this figure of \$36,000.00 when the plaintiff only claimed that \$26,000.00 was paid by the defendant? According to the plaintiff and under the term of Ex. P1 the defendant agreed to pay a deposit of \$10,000.00 on the signing of the agreement but he had failed to do so. The defendant's version was that the said deposit was paid to and received by the plaintiff's agent, Perumal (PW2) as evidenced by a cheque marked as Exhibit D8. In the Court below, PW2 admitted receiving Ex. D8 from the defendant on 9.9.74 and that he cashed it on the following day at the request of the defendant. PW2 also said that he handed the \$10,000.00 back to the defendant after cashing the cheque. This was denied by the defendant. The learned Judicial Commissioner rejected the testimony of PW2 on this point and ruled that the said \$10,000.00 was retained by PW2 on behalf of the plaintiff following the execution of Ex. P1. Furthermore, relying on the acknowledgement in Ex. P1, and sections 91 & 92 of the Evidence Act 1950, the learned Judicial Commissioner said that "it was sufficient for me to come to the conclusion, as I did, that plaintiff had received the \$10,000.00 deposit".

In his judgment the learned Judicial Commissioner held that PW2 was in fact plaintiff's agent. In our judgment, it was not sufficient to show that the \$10,000.00 was paid to PW2 as agent of the plaintiff, the learned Judicial Commissioner should have gone further and considered whether or not the defendant had discharged the onus of proving that PW2, as agent, had authority to receive the deposit of \$10,000.00 on behalf of the plaintiff [see *The Firm of T.A.R.C.T. v. The Firm of Sv. KR*⁽¹⁾]. It is clear from the notes of evidence that the defendant had made no attempt

A to discharge this burden. True, the learned Judicial Commissioner found as a fact that a sum of \$10,000.00 was paid by the defendant to PW2 in March 1975 when the plaintiff was in India. But the record shows that on plaintiff's return to Malaysia the money was handed to her by PW2 and the plaintiff in turn issued a receipt for the sum of \$10,000.00 to the defendant as evidenced by either Ex. D5A or D6A. As Lord Esther M.R. said in *Linck, Moeller & Co. v. Jameson & Co.*⁽²⁾ "To draw such an inference in business matters would be most dangerous". In that case where a contract of sale stipulated that payment should be made to the sellers, it was held by the Court of Appeal that the purchaser was not justified in paying the purchase money to a broker merely on the ground that, upon a previous transaction between the parties, the sellers had authorised payment to such broker, who had duly paid over the money to them.

Although clause 3 of Ex. P1 appears to contain an acknowledgement by the plaintiff of the receipt of the sum of \$10,000.00 from the defendant at the time of the signing of the contract, it was submitted by learned counsel that the plaintiff was not estopped by sections 91 and 92 to adduce evidence that the \$10,000.00 was in fact not paid or received by her. Authority for such a proposition may be found in the Privy Council case of *Sah Lal Chand v. Indarjit*⁽³⁾ where it was held that (i) section 91 of the Indian Evidence Act (which is in the same terms with section 92 of our Evidence Act 1950) does not preclude oral evidence to contradict a recital of fact in a written contract and (ii) it is settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds. In our judgment, the learned Judicial Commissioner was therefore wrong in law to shut out the oral testimony of the plaintiff that she did not in fact receive the \$10,000.00 from the defendant at the time of the signing of Ex. P1 or at any time thereafter. Since the plaintiff had expressly denied receiving the \$10,000.00 from the defendant and in the absence of any evidence that PW2 paid over the \$10,000.00 to the plaintiff, the finding of the learned Judicial Commissioner by way of inference, that the plaintiff had received the deposit of \$10,000.00 could not be supported. Based on the finding of the Court the \$10,000.00 was and appears to be still being retained by PW2.

Having regard to the conclusion reached by this Court it is plain that up to the date of the filing of the writ, the defendant had only paid to the plaintiff the total sum of \$26,000.00 out of the agreed purchase price of \$90,000.00

The second question we have to determine was whether the learned Judicial Commissioner was right in holding that it was not the intention of the parties to make time the essence of the contracts.

In a contract for the sale of land the time fixed by the parties for completion or performance is not to be strictly construed unless it is the intention of the parties that time should be of the essence of the contract [see *Jamshed v. Burjorji*⁽⁴⁾, *Stickney v. Keeble*⁽⁵⁾, *Warren v. Tay Say Geok & Ors*⁽⁶⁾ and section 56(1) of the Contract Act 1950]. Intention may either be express or implied and there are three cases in which time is of the essence of the contract.

- (a) where the contract expressly states that time shall be of the essence of the contract [*Steedman v. Drinkle*⁽⁷⁾ and *Brickles v. Snell*⁽⁸⁾];
- (b) where time was not originally of the essence of the contract but has been made so by one party giving a notice to the other. Such notice can only be given after the other party has been guilty of unreasonable delay and the time mentioned in the notice must be reasonable [*Stickney v. Keeble (supra)*].
- (c) where from the nature of the property time may be considered to be of the essence of the contract [*Tilley v. Thomas*⁽⁹⁾].

These three principles are cited by the then Court of Appeal in the case of *Haji Hasnan v. Tan Ah Kian*⁽¹⁰⁾. In *Yeow Kim Pong Realty Ltd. v. Ng Kim Pong*⁽¹¹⁾ the Privy Council said at page 120.

"The question whether time is the essence of a contract is one to be determined by ascertaining the real intention of the parties. This is to be gathered by the examination amongst other things of attendant circumstances."

In *Jamshed* case the material facts are these:

On July 8, 1911 the respondent agreed in writing to sell the leasehold interest to the appellant for Rs. 85,000 and the appellant paid Rs.

- A 4000 of this sum as deposit. This agreement provided by clauses 1 and 2 that the title was to be made marketable; that the conveyance was to be prepared and received within two months from the date of the agreement; that on signing the document of sale Rs. 80,500 were to be paid and
- B after its registration the remaining Rs. 500. The 5th clause provided that on payment of the Rs. 81,000 as provided by clause 2 the document of sale or conveyance was to be executed but should the purchaser not pay the amount within the fixed period abovementioned he was to have no right to
- C the deposit of Rs. 4000 paid on account and any claim of his was to be void and the vendor was, after that date, to be at liberty to resell.

- On October 3, 1911, more than two months after the date of the contract solicitors for the
- D appellant requisition for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled. The respondent did not comply with this requisition but on October 6, 1911 asserted a right to put an end to the contract on the ground
- E that time was of its essence and to forfeit the deposit on the ground that the appellant had failed to complete his purchase within the date fixed.

- After stating the relevant law and equity Viscount Haldane in delivering the judgment of the
- F Privy Council said at page 85:

- "Applying these principles to the agreement before them, their Lordships are of the opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purpose of specific performance time was not of the essence of the bargain. They do not
- G think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies"

Earlier on the learned judge said:

- "Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which courts of equity apply,
- H when, for instance, they decree specific performance with compensation for a non-essential deficiency in the subject-matter."

In the case of *Lee Yew Hin v. Kow Lup Piow*⁽¹²⁾ the appellant had entered into a contract with the respondent for the purchase of 105 acres

out of about 1045 acres of rubber lands. The respondent himself had agreed to purchase the lands from a third person. A deposit of \$22,000.00 was paid by the appellant and it was agreed that the balance of the purchase price should be paid on or before November 20, 1967. The appellant did not pay the balance of the purchase price on that date, and the deposit was forfeited. The appellant brought an action for rescission of the contract, for the refund of the deposit of \$22,000.00 and for damages against the respondent. The learned judge held that the deposit was rightly forfeited. On appeal to the Federal Court, it was held that as the appellant had bound himself to pay the balance of the purchase price on November 20, 1967 and as he had failed to do so, he had committed a breach of the contract and the respondent was entitled to repudiate the contract and to forfeit the deposit.

However, on examination of the judgment of Gill F.J. it was clear that clause 10 of the contract provided that time wherever stipulated in the agreement shall always be deemed to be of the essence of the contract.

There was therefore an express provision making time to be of the essence of the contract. On the other hand, no such clause was inserted in *Jamshed* case. Despite a term providing for the forfeiture of the deposit if the balance of the purchase price was not paid on the time fixed by the parties, the Privy Council held on construing the language and subject-matter of the contract that time had not been made the essence.

Now, what are the facts in this case? It appears that in Ex. P1 clause 3 provides, *inter alia*, that the balance of \$65,000.00 shall be paid on March 31, 1977. And in the event that Somoo s/o Sinniah (defendant) fails to pay the balance of \$65,000.00 to Ganam d/o Rajamany (plaintiff) the money (deposit) of \$10,000.00 shall be forfeited and not to be claimed (see clause 6). Similar conditions are provided in Ex. P2 that the balance of \$10,000.00 shall be paid on March 31, 1977 (clause 3) and in default the deposit of \$5,000.00 shall be forfeited (see clause 6). It is common ground that there was no provision in both Ex. P1 and P2 expressly making time to be of the essence of the contracts and that the defendant had not paid the deposit of \$5,000.00 under Ex. P2.

Applying the principles stated in *Jamshed* case and since the subject-matter of the contracts

A consists of padi lands and coconut plantations and having regard to the language used in the contracts, we reach the same conclusion as the learned Judicial Commissioner that the parties had not intended to make time the essence of the contracts.

B The learned Judicial Commissioner held further that where time was not originally of the essence of the contract but if the plaintiff wanted to make it so she should give reasonable notice to the defendant in plain and clear language and as the plaintiff had failed to give any notice to the defendant to complete within a reasonable time named therein and making time to be of essence of the contracts, the plaintiff was wrong in law to rescind the two contracts on November 9, 1977. In the judgment of the learned Judicial Commissioner the rescission was premature, illegal and of no effect.

For the plaintiff it was submitted by learned counsel that since the defendant was not going to pay the balance of the purchase price of \$54,000.00 to the plaintiff it was therefore unnecessary to give any notice making time of the essence of the contracts. In support of this submission learned counsel appears to rely on *Etalissements Chainbaux S.A.R.L. v. Harbormaster Ltd.*⁽¹³⁾ and *In re Stone & Saville's Contract*⁽¹⁴⁾ In *Etalissements* case the relevant facts are these:

F "Sale of marine engine units by defendants to plaintiff French Company in July 1951 – payment to be by a letter of credit payable against shipping documents in favour of defendants/sellers to be opened in London within a few weeks – delivery to start in eight months from July 1 – plaintiffs/buyers unable immediately to obtain sterling enabling them to furnish letter of credit – time for opening letter of credit of the essence of the contract – no complaint of delay by sellers – intimation by buyers to sellers on October 9 that sterling was then available accepted without comment by sellers on October 11 – contract cancelled by sellers on October 22 "having regard to the protracted delay that has occurred over the establishment of letter of credit" – claim by buyers for damages for non-delivery – letter of credit to be opened within a few weeks – effect of acquiescence by sellers in buyers' offer to provide letter after a few weeks had expired – no reimposition by sellers of term that time was of the essence – whether sellers justified in cancelling."

I Held that buyers were in breach of their obligation to open letter of credit within a few weeks which was a condition precedent to the delivery of the goods, but that that breach was waived by the subsequent conduct of the sellers; that although the sellers' letter of October 11 made it plain that

they were not reimposing any term that time was of the essence, they had nevertheless proved that at the time of the cancellation the buyers could not have complied with their obligation to provide a letter of credit within any reasonable extension of time; and that accordingly the sellers were justified in cancelling – judgment for defendants.

We agreed with the submission of learned counsel for the defendant that the facts in *Establissemments* case are distinguishable from the facts in the instant case in that in the former case, the furnishing of a letter of credit within a few weeks was a condition precedent and time for opening the letter of credit was made the essence of the contract.

In *re Stone & Saville (supra)*, the vendor's solicitors could not answer the requisition of the purchaser despite a number of reminders but nevertheless gave notice to the purchaser to complete. Instead the purchaser rescinded the contract and requested for the return of the deposit. The vendor's solicitors informed the purchaser that the deposit was forfeited. The purchaser took out a vendor and purchaser summons seeking a declaration that the vendor had failed to discharge his obligations and claiming return of the deposit.

At the court of first instance Buckley J. made a declaration that the contract had been effectively rescinded and that the purchaser was entitled to repayment of the deposit. On appeal to the Court of Appeal the judgment of Buckley J. was upheld. At page 169 Lord Denning M.R. said:

"..... it seems quite plain to me that the vendor was at fault. He was guilty of a breach going to the root of the contract because he was not, on the face of his documents, able to make a good title to this land. The purchaser was entitled to treat that breach as a repudiation giving her a right to rescind the contract. And she did so by that letter of September 4, 1961. The vendor's solicitors regarded the position differently. They took the view that the purchaser was at fault but they accepted the position that the contract was rescinded...."

In our opinion, the case appears to establish that if the purchaser was entitled to rescind because the vendor was guilty of a fundamental breach going to the root of the contract it was unnecessary for the purchaser to give notice to the vendor making time to be of the essence of the contract. The case of *Re Stone & Saville (supra)*, in our opinion, does not support the proposition that if a purchaser had made default

- A in payment of the balance of the purchase price on the time fixed for performance (if time was not of the essence) the vendor was entitled to rescind the contract unilaterally. In our judgment, the proposition that in a contract for the sale and purchase of land (where time is not of the essence) the fact that the purchaser was not going to pay the balance of the purchase price on the date fixed for performance or within a reasonable time thereafter, would *ipso facto* entitle the vendor to rescind the contract unilaterally without the necessity of giving to the purchaser reasonable notice making time to be the essence of the contract, would appear to be contrary to the provisions of section 56(2) of the Contracts Act 1950 and section 34(1)(c) of the Specific Relief Act 1950 as well as the authorities such as *Jamshed case (supra)* and *Stickney v. Keeble (supra)*. This submission of the learned counsel for the plaintiff also fails.

It follows that we agree with the learned Judicial Commissioner's finding that the unilateral act of the plaintiff in purporting to rescind the two contracts marked as Ex. P1 and P2 on November 9, 1977 without giving to the defendant reasonable notice making time to be of essence was wrong in law.

- A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called "*brutum fulmen*" that is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent [per Lord Wright in *Edridge v. Sathna*⁽¹⁵⁾].
- H In this case, the wrongful rescission of the said contracts was not accepted by the defendant and this appears to be plainly stated in a letter dated November 25, 1977 by the defendant's solicitors to the plaintiff (Ex. P3). The defendant further stated in the letter that he was ready and willing to complete the sale by paying to the plaintiff the balance of the purchase price of \$21,000.00 and asked the plaintiff to specifically perform the said contracts. The defendant reiterated his claim for specific performance in his counterclaim and the learned Judicial Commissioner was satisfied that he had made out a

case and allowed it subject to payment into court to the credit of the plaintiff the sum of \$54,000.00 within six weeks from date of judgment.

Before us, learned counsel for the plaintiff submitted that having regard to the wrongdoings and the unreasonable conduct of the defendant in these proceedings, the learned Judicial Commissioner ought not to have granted the equitable remedy of specific performance. Learned counsel rightly pointed out that the jurisdiction to decree specific performance is a discretionary one [see section 21(1) of the Specific Relief Act 1950] but the section also provides that "the discretion of the court is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a court of appeal". In other words, it is clear that the court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion the circumstances of the case, the conduct of the parties and their respective interests under the contract, are to be remembered. [*Oxford v. Provana*⁽¹⁶⁾ and *Lamare v. Dixon*⁽¹⁷⁾]. Since the court has decreed specific performance of the contracts the onus is on the plaintiff to satisfy this court that the learned Judicial Commissioner had not properly exercised his discretion.

It was contended by learned counsel for the plaintiff that in his defence filed in answer to the statement of claim, the defendant raised a number of frivolous and vexatious issues relating to (a) the purchase price, (b) the time fixed for completion and (c) the amount of money paid towards the said purchase which are in direct contradiction with the unambiguous terms of the contracts marked as Ex. P1 and P2. In the result, the learned Judicial Commissioner ruled in favour of the plaintiff on all these three matters disputed by the defendant. We would like to remark in passing that quite a lot of the court's valuable time had been wasted in adjudicating these three issues.

Now, in a suit for specific performance, a party treated and was required by the court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit [see the dictum of Lord Blanesburgh in *Mama v. Sassoon*⁽¹⁸⁾]. Although, so far as the

A Act [Indian Specific Relief Act 1877 which is *in pari materia* with our Specific Relief Act 1950] is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England [section 24(b) and our section 23(b) is the nearest] it seems invariably to have been recognized, and on principle, their Lordships think rightly, that the Indian and the English requirements in this matter are the same [see *Karasandas v. Chotalal*⁽¹⁹⁾]. This principle has been consistently adopted and applied by the courts in this country.

We now proceed to examine the grounds given by the court for ordering specific performance of the two contracts Ex. P1 and P2. At page 15 of his judgment, the learned Judicial Commissioner relied on a letter marked Ex. P3 dated November 25, 1977 written by the defendant's solicitors to the effect that "the defendant was ready and willing to complete the sale" and a passage in the testimony of the defendant at page 43 of the record where the defendant was reported to have said: "I was prepared to pay the balance of the purchase price that was due to the plaintiff when I went to see my solicitor". In our opinion, for the purpose of considering this important question, it is necessary to see what was written in Ex. P3. In that letter it was stated that the defendant "is indeed ready and willing to complete the sale by paying the balance of the purchase price amounting to \$21,000.00 although the time for payment has not arrived." When the defendant testified in court that he was ready and willing to pay the balance that was due to the plaintiff when he went to see his solicitors he was referring to the sum of \$21,000.00. Furthermore, in paragraph 13 of his pleading the defendant alleged that "The defendant at all material times has been ready and willing to pay to the plaintiff the balance of \$11,000.00 (this sum was later amended to read \$16,000.00 at the trial)". Although there was evidence that the defendant was ready and willing to complete the sale but it must be remembered that the defendant would only do so on his own terms based on the purchase price of \$75,000.00 and not on the agreed purchase price of \$90,000.00. Nowhere did the defendant plead nor did he say in evidence that if the court should hold the contract price to be \$90,000.00 then he would be ready and willing to pay the balance as fixed by the court. If the defendant had pleaded in this manner he might ask the court to follow

Berners v. Fleming⁽²⁰⁾. In our judgment, the stand taken by the defendant would appear to coincide with the one adopted by the plaintiff in the case of *Babu Bindeshri Prashad v. Mahant Jairam Gir*⁽²¹⁾. In that case the purchaser delayed payment of the purchase money of immovable estate, insisting upon the insertion in the conveyance of an absolute warranty of title by the vendor to the property sold and it was held that as a right to such covenant was not shown, his delay of payment was not excused and there was no case for decreeing specific performance. At page 177 the Privy Council said:

" and the position of the parties appears to be this: that the plaintiff has all along, until he saw that the judgment of the High Court was likely to be given against him, been insisting upon having the sale deed with the warranty of title; and it is admitted by his learned counsel at the Bar that he has no right to any such covenant. It has not been attempted to be shown that he had. Thus he was insisting upon having that which he had no right to have, and he delayed performing his part of the agreement for the payment of the purchase money on that account. Under such circumstances as these, it certainly is not a case in which it would be right for this Committee to advise Her Majesty to make any decree for specific performance."

In our judgment, in the context of this case, it was not sufficient for a purchaser to prove that he had at all times been ready and willing to complete the sale; he must also prove that he had performed or had been at all times been ready and willing to perform his part of the contract [see *Mama v. Sasson* (*supra*)] and *Tan Ah Boon v. State of Johor*⁽²²⁾ or his part of the obligations under the contract as fixed or interpreted by the court [see *Berners v. Fleming* (*supra*) and *Warren case* (*supra*)]. Since the defendant was unable to bring his case under this principle, we think the learned Judicial Commissioner was wrong to decree an order that the contracts Ex. P1 and P2 be specifically performed. In our judgment, the learned Judicial Commissioner ought to have refused to make the order on the ground of unreasonable conduct of the defendant coupled with the fact that the case of the defendant, as pleaded and proved, comes within the principle of *Babu Bindeshri Prasad case* (*supra*).

Another matter which the learned Judicial Commissioner ought to consider which he did not appear to have done is section 21(3) of the Specific Relief Act 1950 which reads:

"A case in which the court may properly exercise a discretion to decree specific performance is where the plain-

A tiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance."

It seems clear that the defendant would be unable to bring his case under the provision of this subsection on the evidence produced before the court below. Up-to-date of hearing in the High Court the defendant was proved to have paid the sum of \$26,000.00 only to the plaintiff and this amount represents less than one-third of the contract price of \$90,000.00. Furthermore, this cannot by any stretch of imagination be said to constitute substantial acts within the meaning of the subsection.

In his defence and counterclaim the defendant also pleads in the further alternative, rescission of the contracts and repayment to him by the plaintiff of the sum of \$64,000.00 (this was later reduced to \$59,000.00 at the trial) together with a further sum of \$64,000.00 (later amended to \$59,000.00) as agreed liquidated damages and interest at 18% per annum as from September 9, 1974. Since the plaintiff purported to have repudiated the said contracts on November 9, 1977 we would assume that the plaintiff would also like to have the contracts rescinded if specific performance was refused by the court.

Now, the power of the court to make an order rescinding a contract is contained in Chapter IV of the Specific Relief Act 1950 and the second limb of section 36 is particularly relevant to this case and it reads:

" and the court, if it refuses to enforce the contract specifically may direct it to be rescinded and delivered up accordingly."

But the rescission of a contract in writing cannot be adjudged unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made (see section 35). This is what Lord Blackburn had to say about this in the case of *Erlanger v. New Sombrero Phosphate Co.*⁽²³⁾:

"It is, I think, clear on principles of general justice, that as a condition to a rescission there must be restitutio in integrum. The parties must be put in status quo. See per Lord Cranworth in *Addie vs. The Western Bank* LR. 1 HL 165. It is a doctrine which has often been acted upon both at law and in equity"

In our judgment, having regard to the facts of this case, it is a fit and proper case for us to exercise our jurisdiction contained in the second

limb of section 36 since we are satisfied that there is no difficulty in restoring the plaintiff and the defendant to their original position and we hereby rescind the contracts marked as Ex. P1 and P2 accordingly. *A fortiori*, a considerable time (almost ten years) has lapsed since the parties executed the said contracts.

Now, section 37 provides that "on adjudging the rescission of a contract, the court may require the party to whom the relief is granted to make any compensation to the other which justice may require". The principle underlying this section is whether compensation should be awarded at all or what should be the measure of compensation must depend on the special circumstances of each case. The aim shall be to restore the contracting parties as much as possible to the same position which existed before the contract. In other words, there should be a restitution of the benefits received. As Lord Blackburn rightly pointed out in *Erlanger v. New Sombrero Phosphate Co. (supra)* at page 1278:

"It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without discounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration."

In short, he who seeks equity must do equity. Applying this to the facts of this case, we would make an order that the defendant should be entitled to compensation only by way of the return of the sum of \$26,000.00 paid by him to the plaintiff and we so order. In our opinion, no man can at once treat the contract as avoided by him, so as to assume the property which he parted with it, and at the same time keep the money or other advantage which he has obtained under it. In our judgment, the defendant is not entitled to damages when the contracts are cancelled by the court under section 36 of the Specific Relief Act 1950, and we make no order under this head.

It is common ground that the defendant went into occupation of the First property described as Lot No. 10671 on or about September 10, 1974 and agreed to pay \$1,000.00 per padi harvest every six months. The defendant only paid \$3,000.00 representing three padi harvests and the learned Judicial Commissioner ordered him to pay to the plaintiff another \$3,000.00 for six padi

A harvests calculated up to the month of November 1977. There is no cross-appeal by the defendant against this order.

B In or about November 1977 it is not disputed that the defendant entered into possession of the Second, Third and Fourth properties described as Lot 5481, Lot 10665 and Lot 5482 respectively without the consent and against the wishes of the plaintiff. It seems that the defendant is presently still in occupation of these three parcels of land.

C Now, the Third property is also padi land containing the same acreage and similar condition as the First property. Whereas the Second and Fourth properties are coconut plantations.

D In her amended statement of claim the plaintiff is claiming from the defendant mesne profits in the manner following:

E (a) \$3,500.00 per padi harvest every six months as from April, 1977 (since the learned Judicial Commissioner had awarded compensation up to November 1977 the date should now read November 26, 1977 in respect of the First property);

F (b) \$100.00 every two months as from November 26, 1977 in respect of the Second property;

(c) \$3,500.00 per padi harvest every six months as from November 26, 1977 in respect of the Third property; and

G (d) \$60.00 every two months as from November 26, 1977 in respect of the Fourth property.

H Since the two contracts had been rescinded by the court we hold that the plaintiff is not entitled to mesne profits in respect of these four properties but only to reasonable compensation as justice may require. In our judgment, compensation should be assessed at \$1,000.00 per padi harvest every six months for the First and Third properties from November 26, 1977 onwards until vacant possession is delivered up to the plaintiff. The claims of \$100.00 and \$60.00 for the unlawful occupation of the Second and Fourth properties which are coconut plantations for every two months from November 26, 1977 onwards seem reasonable and in the absence of evidence to the contrary, we would allow the claims in full until vacant possession is yielded up to the plaintiff. As the next padi harvest will be due in the latter

part of the year we order the defendant to deliver up vacant possession of the First and Third properties to the plaintiff on or before November 30, 1984. The defendant, however, is ordered to yield up vacant possession of the Second and Fourth properties to the plaintiff on or before September 30, 1984. It follows that the defendant is ordered to pay compensation to the plaintiff in the manner following:

- (a) As regards the First property (padi land) the sum of \$14,000.00;
- (b) As regards the Second property (coconut plantation) the sum of \$4,600.00;
- (c) As regards the Third property (padi land) the sum of \$14,000.00; and
- (d) As regards the Fourth property (coconut plantation) the sum of \$2,760.00.

In the exercise of our discretion, we do not think we should award interest to be paid by the parties concerned.

Under the circumstances of the case, we allow the plaintiff to set-off against the \$25,000.00 which she is ordered to pay to the defendant as compensation.

We therefore set aside that part of the judgment of the learned Judicial Commissioner decreeing specific performance of the contracts marked as Ex. P1 and P2, as well as the order for costs. We order that each party to pay his or her own costs here and in the court below.

To that extent the appeal is allowed.

Appeal allowed.

Solicitors: R.R. Chelliah Bros.; Vadiveloo & Co.

NATIONAL COMPANY FOR FOREIGN TRADE v. KAYU RAYA SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) February 9, March 23 & July 14, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 246 of 1983]

Practice and Procedure – Pleading – Whether necessary to plead consideration in statement of claim – Application for summary judgement – Requirements – Issue or question to be tried – Contracts Act, 1950, s.2 – R.H.C. 1980, O.14, O.18 rr. 11 & 15.

In this case the appellant, a state trading entity of Aden entered into an agreement in writing with the respondent, a private limited liability company in Malaysia, whereby the appellant agreed to buy and the respondent agreed to sell timber to be shipped from various ports in Malaysia to Aden. The terms of payment were US\$232 per ton C & F. In July 1979 the respondent shipped timber on board the vessel "Senang Island" from Kuantan and the appellant duly made payment under the agreement. While enroute to Aden the vessel was arrested in Singapore and the cargo of timber was unloaded in Singapore. The respondent agreed to take full responsibility for the reshipment of the timber and also agreed to be liable for the freight charges as well as all incidental expenses. Arrangements were made to ship the timber by the "Kota Abadi" to Aden and the appellant advanced the freight of S\$907,350/- at the request of the respondent, on the express undertaking of the appellant to pay the aforesaid sum less S\$60,405/- which the appellant had agreed to bear. Despite numerous demands the respondent failed to effect payment of the balance. The appellant brought an action against the respondent and the Assistant Registrar directed that summary judgment be entered in favour of the appellant in the sum of S\$846,930/-. On appeal the High Court reversed the decree. In his grounds of judgment the learned judge took the view that consideration ought to be expressly pleaded in the statement of claim. The appellant appealed.

Held: (1) since "consideration", "agreement" or "contract" have been statutorily defined in the Contract Act 1950 they cannot be said to be material facts and therefore need not be specifically pleaded in the statement of claim;

(2) in this case the respondent has satisfied the Court on affidavit evidence that there is an issue or question to be tried and therefore the application for summary judgment ought to be refused.

Cases referred to:

- (1) *European Bank v. Punjab Bank* (No. 2) [1983] 1 W.L.R. 642.
- (2) *Syros Shipping Co. v. Elaghill Trading Co.* [1981] 3 All E.R. 189.
- (3) *Gold Ores Reduction Co. v. Pain* [1892] 2 Q.B. 14.
- (4) *Sheba Gold Mining Co. v. Trubshawe* [1892] 1 Q.B. 674.

FEDERAL COURT.

Wong Chong Wah for the appellant.

C. Abraham for the respondent.

Cur. Adv. Vult.